California Law Review

Published by the Faculty and Students of the School of Jurisprudence of the University of California, and issued Bi-monthly throughout the Year

Subscription Price, $3.50 Per Year Single Copies, 65 Cent

Comment on Recent Cases

BILLS AND NOTES: NEGOTIABILITY OF PROMISSORY NOTE SECURED BY TRUST DEED—The two chief hardships of the common law of mortgages were remedied in California by sections 726 and 744 of the Code of Civil Procedure. The latter section altered the common law rule that, upon non-performance of the condition, the estate vested absolutely in the mortgagee; while by section 726 the mortgagor was deprived of his power to bring a personal action on the debt without impairing the mortgage security.[1] But section 726 has had an effect which probably was not contemplated. It

[1] Toby v. Oregon Pacific R. Co. (1893) 98 Cal. 490, 494, 33 Pac. 550.

was held in Meyer v. Weber[2] that the operation of this section, which forbids an independent action on a promissory note secured by a mortgage, makes the liability of the promisor contingent and dependent upon there being a deficiency after the sale of the mortgaged premises; and that the note is, therefore, non-negotiable.[3] The result achieved is, of course, contrary to the great weight of authority;[4] but the rule has been reiterated and restated many times.[5] So it is well settled in this state that where a note is secured by a mortgage upon real or personal property situated in California,[6] both executed at the same time or as parts of one transaction, the note, although negotiable in form, is not negotiable in fact, where the purchaser takes it with knowledge of the mortgage.

In deciding the case of *Quinn v. Rike*,[7] the District Court of Appeal said, "For the purpose of securing payment of the same" [a promissory note] "defendant made and executed a deed of trust . . . The note was, therefore, non-negotiable. (Metropolis Trust & Savings Bank v. Monnier, 169 Cal. 592.)" But the case cited did not refer to trust deeds; it stated the rule only as applicable to mortgages. And of the seven cases cited in that case, not one is a case involving a trust deed.[8] Thus is presented the ques-

---

[2] (1901) 133 Cal. 681, 684, 65 Pac. 1110.

[3] See note in 1 California Law Review, 366. The effect of the Negotiable Instruments Law upon this rule is discussed in "The Adoption of the Negotiable Instruments Law in California," by Maurice E. Harrison, 6 California Law Review, 23, at pp. 25-29.

[4] It is generally held that a note is not non-negotiable because secured by a mortgage unless the mortgage contains provisions not permitted in a negotiable instrument. 32 L. R. A. (N. S.) 858n. and 861n.; 8 C. J. 200; 27 Cyc. 1324-1325. Although the point has not yet been decided, it is to be expected that those states which have adopted our § 726 (infra, n. 15) will follow the reasoning of Meyer v. Weber. See Cornish v. Woolverton (1905) 32 Mont. 456, 81 Pac. 4, 9, 108 Am. St. Rep. 598, and Buhler v. Loftus (1917) 53 Mont. 546, 565, 165 Pac. 601.

[5] Briggs v. Crawford (1912) 162 Cal. 124, 121 Pac. 381; Helmer v. Parsons (1912) 18 Cal. App. 450, 123 Pac. 356; Mentry v. Broadway Bank etc. Co. (1912) 20 Cal. App. 388, 129 Pac. 470; National Hardware Co. v. Sherwood (1913) 165 Cal. 1, 130 Pac. 881; Taylor v. Jones (1913) 165 Cal. 108, 131 Pac. 114; Smiley v. Watson (1913) 23 Cal. App. 409, 138 Pac. 367; Kohn v. Sacramento Electric, Gas, & Ry Co. (1914) 168 Cal. 1, 141 Pac. 626; Metropolis etc. Sav. Bank v. Monnier (1915) 169 Cal. 592, 147 Pac. 265; Anderson v. Wickliffe (1918) 178 Cal. 120, 172 Pac. 381; Stoner v. Security Trust Co. (1920) 32 Cal. App. Dec. 30, 190 Pac. 500; W. P. Fuller & Co. v. McClure (1920) 32 Cal. App. Dec. 574, 191 Pac. 1027. McDonald v. Randall (1903) 139 Cal. 246, 72 Pac. 997, which held contra, was expressly overruled by Smiley v. Watson, supra.

[6] § 726 is not applicable to cases where the mortgage security is in another state. Felton v. West (1894) 102 Cal. 266, 36 Pac. 676; McGue v. Rommel (1906) 148 Cal. 539, 83 Pac. 1000; Denver Stockyards Bank v. Martin (1918) 177 Cal. 223, 170 Pac. 428.

[7] (Dec. 2, 1920) 33 Cal. App. Dec. 709, 194 Pac. 761.

[8] Flood v. Petry (1913) 165 Cal. 309, 132 Pac. 256; Meyer v. Weber, supra, n. 2; Briggs v. Crawford, supra, n. 5; Helmer v. Parsons, supra, n. 5; Mentry v. Broadway Bank etc. Co., supra, n. 5; National Hardware Co. v. Sherwood, supra, n. 5; Taylor v. Jones, supra, n. 5.

tion whether or not the rule of Meyer v. Weber is applicable to a promissory note secured by a deed of trust.

On one occasion, the Supreme Court, in department, answered this question in the affirmative, holding a trust deed to be "within the policy established by section 726";[9] but this department opinion was set aside upon hearing in bank, where the court "assumed" that a trust deed is not a mortgage within the meaning of that section of the code.[10] Section 726 does not operate so as to require the holder of a pledge,[11] a vendor's lien,[12] or a mechanic's lien[13] to resort to his security before suing on the personal obligation. And we have, from the District Court of Appeal, a clear and direct statement that "the provisions of section 726 of the Code of Civil Procedure . . . have no application to a deed of trust."[14] In fact it is difficult to see how section 726, which refers particularly and solely to mortgage security, and which has never been extended to any other sort of security, can be held to apply to a deed of trust.[15]

In many jurisdictions it might well be argued that a deed of trust is, in legal effect, only a mortgage with a power of sale, and that a rule applicable to one of these forms of security should be applied to the other.[16] But in California there has long been a clear and wide distinction between trust deeds and mortgages. According to our cases a deed of trust is neither a "lien" nor an "encumbrance" as those terms are defined in our codes;[17] it "has no feature in common with a mortgage, except that it is executed to secure an indebtedness".[18] By a long line of cases it has been settled that section 744,[19] the companion section of 726, is not applic-

---

[9] Herbert Kraft Co. v. Bryan (1902) 6 Cal. Unrep. 923, 68 Pac. 1020.

[10] Herbert Kraft Co. v. Bryan (1903) 140 Cal. 73, 81, 73 Pac. 745.

[11] Ehrlich v. Ewald (1884) 66 Cal. 97, 4 Pac. 1062; Marble Co. v. Merchants' Nat. Bank (1911) 15 Cal. App. 347, 352, 115 Pac. 59.

[12] Samuel v. Allen (1893) 98 Cal. 406, 407, 33 Pac. 273.

[13] Bates v. Santa Barbara Co. (1891) 90 Cal. 543, 27 Pac. 438.

[14] Smiley v. Watson, supra, n. 5.

[15] Four other states have adopted our § 726: Idaho, Code Civ. Proc. (1881) § 468, Rev. Codes (1907) § 4520; Montana, Code Civ. Proc. (1895) § 1290, Rev. Codes (1907) § 6861; Nevada, Comp. Laws (1900) § 3343, Rev. Laws (1912) § 5501; and Utah, Comp. Laws (1888) § 3460, Comp. Laws (1907) § 3498. But there has not been a decision in any of those states which can aid us in California. Idaho has held that a trust deed must be foreclosed under § 4520, but only because Idaho did not adopt §§ 2931 and 2932 of our Code of Civil Procedure. Brown v. Bryan (1898) 6 Idaho 1, 51 Pac. 995, 997. In Montana it is held that § 6861 is applicable only where the security is a mortgage or "what the law would deem the equivalent of a mortgage." State Savings Bank v. Albertson (1909) 39 Mont. 414, 102 Pac. 692, 695.

[16] 1 Jones on Mortgages (7th ed.), p. 59, § 62; Ann. Cas. 1913A 1047.

[17] Weber v. McCleverty (1906) 149 Cal. 316, 320, 86 Pac. 706, which considers §§ 1114 and 2872 of the Civil Code and §§ 1180 and 1475 of the Code of Civil Procedure.

[18] Koch v. Briggs (1859) 14 Cal. 256, 262.

[19] § 744 was formerly § 260 of the Practice Act.

able to deeds of trust;[20] and there are several other instances where statutes referring expressly to mortgages have been held not to include deeds of trust.[21] Clearly the two forms of security are not identical in California.[22]

If the rule of Meyer v. Weber is to be applied to a note secured by a deed of trust, the extension should be accomplished by a course of reasoning clear and convincing.[23] An argument merely by analogy would be refuted by the well-recognized distinction between mortgages and trust deeds; and section 726, the sole reason for applying the rule in the case of mortgage security, is not applicable to deeds of trust. Indeed it is difficult to conceive of a valid reason why the execution of a trust deed should, without more, render a promissory note non-negotiable. Surely the statement, for incorporation into our business practice, of such a rule, newly-announced, supported by only one case—that a mortgage case—is neither satisfactory nor sufficient. *R. V.*

BONDS: NEGOTIABILITY AS AFFECTED BY PLACE OF TRANSFER—In *King v. Harford*[1] the court reached the surprising conclusion that one who purchases a bearer bond in the open market, bona fide and at the market price, may be guilty of conversion from the original owner who intrusted the bond to the seller. The instrument in question, owned by an estate, was a Southern Pacific Railway Company refunding bond secured by a mortgage. It had been placed by the administratrix and sole legatee in the hands of

---

[20] Koch v. Briggs, supra, n. 18; Grant v. Burr (1880) 54 Cal. 298, 301; Bateman v. Burr (1881) 57 Cal. 480, 483; Durkin v. Burr (1882) 60 Cal. 360; Savings & Loan Society v. Deering (1885) 66 Cal. 281, 286, 5 Pac. 353; Partridge v. Shepard (1886) 71 Cal. 470, 478, 12 Pac. 480; Savings & Loan Society v. Burnett (1895) 106 Cal. 514, 528, 39 Pac. 922; Weber v. McCleverty, supra, n. 17.

[21] Under Cal. Prob. Act, § 133 (now Cal. Code Civ. Proc. § 1497), it was held that although a creditor holding a mortgage lien on the property of the estate of a deceased person must, in order to preserve it, present his claim for allowance within the statutory period, one secured by a deed of trust need not. Pitte v. Shipley (1873) 46 Cal. 154; Harp v. Calahan (1873) 46 Cal. 222; Whitmore v. San Francisco Savings Union (1875) 50 Cal. 145; and this decision has been followed in More v. Calkins (1892) 95 Cal. 435, 438, 30 Pac. 583, 29 Am. St. Rep. 128, which holds that §§ 1493, 1500 and 1502 of the Code of Civil Procedure are not applicable to deeds of trust. Likewise § 1475, which includes mortgage security, does not apply to deeds of trust. Weber v. McCleverty, supra, n. 17. (It is interesting to note here that by the 1917 amendment to § 1475, the rights even of a mortgagee are protected unless he has been notified by the executor or administrator.)

[22] See article, "Trust Deeds and Mortgages in California," by A. M. Kidd, 3 California Law Review, 381.

[23] It has been intimated that one who accepts a trust deed may be held to have contracted to pursue the terms of the deed when he attempts to collect the debt forcibly. See Herbert Kraft Co. v. Bryan, supra, n. 10; Pitzel v. Maier Brewing Co. (1912) 20 Cal. App. 737, 130 Pac. 706; and note in 1 California Law Review, 297.

[1] (July 15, 1920) 32 Cal. App. Dec. 764, 191 Pac. 998.